

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Part 90 of the  
Commission's Rules to Provide  
for the Use of the 220-222 MHz Band  
by the Private Land Mobile  
Radio Service

Implementation of Sections 3(n) and 332  
of the Communications Act

Regulatory Treatment of Mobile Services

Implementation of Section 309(j) of the  
Communications Act -- Competitive Bidding,  
220-222 MHz

PR Docket No. 89-552  
RM-8506

DOCKET FILE COPY ORIGINAL

GN Docket No. 93-252

PP Docket No. 93-253

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COMMENTS OF  
SMR ADVISORY GROUP, L.C.

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September 27, 1995

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## SUMMARY

The Third Notice in the captioned proceeding proposes a new framework for the operation and licensing of the 220-222 MHz band. The rules put forth by the Commission in the Third Notice seek to further the goals of improving efficiency in the licensing process, eliminating unnecessary regulatory burdens on both existing and future licensees and enhancing the competitive potential of the 220 MHz Service. The resulting framework proposed by the FCC generally meets these objectives, subject to the modifications proposed in these Comments.

The FCC's proposal to license Phase II channels in five regional areas and 172 Economic Areas better reflects the existing and projected use of the 220 MHz Service, and SMR Advisory therefore supports these defined license areas. SMR Advisory further believes that the Commission should license nationwide channel blocks during Phase II, and so endorses the FCC's proposal to return the 33 non-commercial nationwide applications currently pending for 30 nationwide frequencies and to proceed with the licensing of these frequencies under Phase II licensing procedures. This action will (i) best maximize the availability of nationwide 220 MHz service to the public, (ii) best further the most expeditious provision of nationwide service to the public, and (iii) best ensure that the spectrum will be held by parties who value it most highly.

With respect to the channel block sizes proposed in the Third Notice, SMR Advisory urges the FCC to specify 2 regional blocks of 30 channels each, 3 Economic Area blocks of 15 channels each, and 2 Economic Blocks of 10 channels each. The increased channel numbers proposed by SMR Advisory will prove more responsive to the demands

in the marketplace, and will increase the flexibility of 220 MHz licensees to meet those demands.

SMR Advisory supports the lifting of use restrictions in the 220 MHz Service, particularly with regard to fixed services, paging services and the aggregation of channels. These modifications will better enable 220 MHz licensees – granted under both Phase I and Phase II licensing procedures – to maximize the use of their licenses and to compete more effectively in the marketplace. SMR Advisory expects, however, that the narrowband technology originally contemplated for this frequency band properly will continue to play a key role in the provision of service in the 220-222 MHz band.

The application, modification and special temporary authority procedures proposed by the FCC for Phase II Licensees generally are consistent with other reclassified mobile services, and should be adopted for the 220 MHz Service. The FCC should clarify, however, that any initial requests for special temporary authority (or extensions thereto) requested by Phase I Licensees should be deemed to have met the "extraordinary" circumstances required for a grant of special temporary authority until such time as the modifications filed by Phase I Licensees have been granted, regardless of their grandfathered status or their classification.

SMR Advisory supports the FCC's proposed auction rules for the 220 MHz Service. Based on the Phase I 220 MHz systems already in operation, the Phase II 220 MHz systems almost certainly will be used primarily to provide for-profit services. Regarding the auction method to be used, Phase II 220 MHz licenses are likely to be highly

interdependent; the FCC's proposed use of a simultaneous multiple round auction procedure, therefore, is more appropriate than any other auction method.

SMR also supports the specific auction rules proposed for bid increments, stopping and activity rules, application procedures and payment amounts. With respect to the FCC's proposal for designated entities, SMR Advisory believes that the bidding preferences proposed for small businesses (as defined by the FCC) are necessary to provide such entities with a meaningful opportunity to participate in the auctions. Moreover, the proposed bidding credits of 10% for Economic Areas and 40% for Regional Areas should be sufficient to provide such an opportunity.

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To: The Commission

**COMMENTS OF SMR ADVISORY GROUP, L.C.**

SMR Advisory Group, L.C. ("SMR Advisory"), by its counsel and pursuant to Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, hereby submits its comments on the Second Memorandum Opinion and Order and Third Notice of Rulemaking ("Third Notice")<sup>1/</sup> in the captioned proceeding. The Third Notice proposes a new framework for the operation and licensing of the 220-222 MHz band ("220 MHz Service"). In considering these new rules, the Commission seeks to balance the interests of the current licensees in the 220 MHz Service -- so called "Phase I

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<sup>1/</sup> FCC 95-312, PR Docket No. 89-552, RM-8506, released August 28, 1995.

Licensees" – with the interests of the "Phase II Licensees" receiving authorizations pursuant to the newly adopted regulatory framework.

The Commission's proposed rules encompass four general areas which are addressed in these Comments.

- First, the Third Notice requests comment on its plan to license channels in regional and local blocks (known as Economic Areas), and further, requests comment on whether it should return pending mutually exclusive, non-commercial, nationwide applications for licensing by auction, or whether such applications should be retained and licensed by lottery or comparative hearing;
- Second, the Third Notice proposes various technical and operational modifications to the existing 220 MHz rules, which generally remove current restrictions in the 220 MHz Service and expand the permissible use of the 220 MHz frequencies to include, for example, unrestricted paging and fixed operations;<sup>2/</sup>
- Third, the Third Notice seeks to adopt various definitions for initial applications, amended applications and applications to modify authorizations so as to establish consistent regulations applicable to all commercial mobile service providers, including requirements affecting grants of special temporary authority;
- Fourth, the Third Notice proposes to auction all Phase II Licenses pursuant to a simultaneous multiple round procedure, and to adopt certain bidding preferences for small businesses.

SMR Advisory's Comments on these issues are set out below.

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<sup>2/</sup> The Commission has also requested comment on the manner in which the Phase II Licensees will protect existing Phase I Licensees. SMR Advisory has talked extensively with other members of the 220 MHz industry on this issue and has participated in several meetings on this subject held by the 220 MHz Council of the American Mobile Telecommunications Association, Inc. In light of the short time period permitted for comments, the technical complexity of this issue and its critical importance to all Phase I Licensees, additional time is needed to formulate a definitive position on this matter, and SMR Advisory reserves comment on the matter of Phase I protection until the reply comments in this proceeding.

## I.

### INTRODUCTION

SMR Advisory manages some eighty-five (85) 220-222 MHz licensed systems, of which approximately sixty (60) have been constructed. These constructed systems constitute approximately thirteen percent (13%) of the total 220 MHz systems constructed to date. SMR Advisory also is an active member of the 220 MHz Council of the American Mobile Telecommunications Association ("AMTA") and has worked diligently, both directly and through AMTA, to assist the Commission in the formation of a regulatory framework which meets the FCC's expressed goals of improving efficiency in the licensing process, eliminating unnecessary regulatory burdens on both existing and future licensees, and enhancing the competitive potential of the 220 MHz Service in the mobile services marketplace.

The adoption of this Third Notice comes more than four-and-one-half years after the first applications for 220 MHz systems were accepted in May of 1991. These applications were a significant step in the FCC's then-expressed goal to establish a service in the 220 MHz band "for the development of spectrally-efficient narrowband technology to afford this technology an opportunity to gain acceptance in the marketplace." Third Notice at ¶3. Following the issuance of the first licenses in the 220 MHz Service, SMR Advisory, along with other industry participants, responded to the FCC's urging and moved to test the theory of narrowband technology in the marketplace. This effort has not been easy; nor has it been inexpensive. During the past few years, SMR Advisory and other industry participants have sought to establish a service which is more spectrally efficient, while maintaining a high quality for subscribers. These efforts, following the



investment of significant time and money, have played a significant role in the development of a service which will enhance the choices of wireless services available to the public.

Many of the current rules governing the 220 MHz Service should change to reflect the actual marketplace experience of entities like SMR Advisory. In addition, changes in the regulatory climate generally have prompted an overhaul of the regulations governing mobile services in particular.<sup>3/</sup> The regulatory uncertainties brought about by these market changes in general and the impending Third Notice in particular, however, has detracted from the business planning of every 220 MHz industry participant. What will the FCC do with respect to Phase I Licensees? How will the Phase II Licensees interact with the Phase I Licensees? Will the FCC lift restrictions currently existing in the 220 MHz service? How will the Phase II frequencies be allocated? These questions have made it difficult for SMR Advisory to move definitively forward to develop its business as aggressively and effectively as it would have liked.<sup>4/</sup>

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<sup>3/</sup> These changes originated with certain legislation directives to establish regulatory parity among substantially similar mobile services. See The Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993)(hereinafter, the "Budget Act"). The Commission subsequently released a series of orders designed to implement this regulatory overhaul. See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988 (1988) ("CMRS Third Report and Order"). In the CMRS Third Report and Order, the FCC deferred a comprehensive re-evaluation of the 220 MHz Service to a separate rulemaking, a deferral which now has culminated in the release of the Third Notice.

<sup>4/</sup> This same uncertainty has plagued existing 220 MHz operators with respect to modifications to Phase I Licenses, which have been frozen for more than four years. The FCC's proposal on this issue, addressed in the Fourth Notice of Proposed Rulemaking in this proceeding (FCC 95-381, PR Docket No. 89-552, released August 29, 1995) ("Fourth Notice"), fails to address the needs of the public generally and the needs of the 220 MHz industry in particular. SMR Advisory urges the FCC to adopt the alternative proposed by  
(continued...)

SMR Advisory welcomes the FCC's Third Notice, therefore, as the first step needed to bring certainty into this young industry so that it may move forward to develop to its fullest potential. In this regard, SMR Advisory speaks as a present and future participant in the 220 MHz industry, both from the perspective of a manager of existing Phase I Licensees and as a likely participant in the licensing procedures for obtaining Phase II Licenses.

## II.

### DISCUSSION

#### A. **SMR Advisory Supports the Use of Nationwide, Regional and Local Areas for Phase II Licensing.**

In the Third Notice, the Commission proposed three size categories for the licensing of Phase II authorizations:

- Nationwide,
- Five (5) Regional Areas; and
- One Hundred Seventy Two (172) geographic areas defined as "Economic Areas" by the Bureau of Economic Analysis, Department of Commerce.<sup>5/</sup>

SMR Advisory believes that the use of each of these different-sized area groups is appropriate for the provision of 220 MHz Service.

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<sup>4/</sup>(...continued)

AMTA and supported by SMR Advisory, that licensees be permitted to relocate their facilities a maximum of one-half the distance over 120 km toward any co-channel licensee to a maximum of 35 km, unless the consent of the co-channel licensee is obtained for a greater move. AMTA's alternative, unlike the FCC's proposal, provides existing operators with the flexibility necessary to make use of their licenses without encroaching unduly on the rights of other Phase I Licensees or the Phase II Licensees.

<sup>5/</sup> See Third Notice, Appendices C and D for a list of the proposed Economic Areas and Regional Areas.

## 1. Nationwide Blocks

With respect to the nationwide blocks, there are currently pending before the Commission 33 applications for four nationwide licenses consisting of a total of 30 nationwide, non-commercial channels. Although these applications have been pending since May 1, 1991, the FCC has refrained from processing them while it has considered various petitions for reconsideration in the 220 MHz proceeding. Currently, three additional petitions for reconsideration of the FCC's latest 220 MHz Second Reconsideration Order remain outstanding.<sup>6/</sup>

The FCC has requested comment on the manner in which it should dispose of the 33 pending nationwide applications and has presented three alternatives for consideration: (i) returning the applications without prejudice (including the filing fees) and proceeding to license the 30 nationwide channels by auction; (ii) continuing with the processing of these applications by lottery; (iii) continuing with the processing of these applications by comparative hearing. Third Notice at ¶ 30. As a general matter, the Omnibus Budget Reconciliation Act of 1993 granted to the Commission the discretion to select the appropriate

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<sup>6/</sup> Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Services, PR Docket 89-552, 6 FCC Rcd 2356 (1991) ("220 Mhz Report and Order"); Further Notice of Proposed Rulemaking, 7 FCC Rcd 898 (1992) ("220 MHz Further Notice"); recon. granted in part and denied in part and rules amended, Memorandum Opinion and Order, 7 FCC Rcd 4484 (1992) ("220 Memorandum Opinion and Order"); Erratum, DA 92-1177, released August 28, 1992; Second Erratum, 7 FCC Rcd 6297 (1992); recon. granted in part and denied in part, Order, 8 FCC Rcd 4161 (1993) ("220 MHz Second Reconsideration Order"); appeal dismissed, Evans v. FCC, Case No. 92-137 (D.C. Cir. March 18, 1994). Certain additional petitions seeking reconsideration of specific elements of the 220 MHz Second Reconsideration Order remain pending as of this date.

licensing method for applications which were filed prior to the effective date of the legislation, but were not licensed prior to that date.

In determining the appropriate disposition of these applications, SMR Advisory believes that the FCC should consider the following factors:

- (i) Which alternative would maximize the availability of nationwide service to the public;
- (ii) Which alternative would best further the most expeditious provision of nationwide service to the public; and
- (iii) Which alternative would best ensure that the spectrum would be held by parties who value it most highly?

SMR Advisory believes that consideration of these factors dictates that the FCC select the first presented alternative for disposition of the pending nationwide applications – return of the applications (and the refund of the filing fees), and the licensing of the 30 nationwide channels by auction.

With respect to the first factor, the return of the applications and the subsequent auctioning of the nationwide channels would clearly result in a greater availability of nationwide 220 MHz service to the public as compared to the licensing of the pending applications by lottery or comparative hearing. It is most likely, based on the applications filed for non-nationwide Phase I Licenses, that the 220 MHz systems resulting from the acquisition of auctioned nationwide frequencies would be primarily commercial in nature, thus resulting in greater access by the public to this service than if the frequencies remained non-commercial. If the FCC decides to retain the existing applications, on the other hand (whether by lottery or comparative hearing), the resulting systems would be limited

primarily to non-commercial use; access by the general public to the services provided over these frequencies, therefore, would be far more limited.<sup>27</sup>

Regarding the second factor, returning these applications and auctioning the frequencies may well result in the more expeditious provision of service to the public over these frequencies. If the Commission continues to process these pending applications, it must first address and resolve the three petitions for reconsideration which remain pending. Second, the FCC still must elicit the amendment information required with respect to the pending applications and then review them to determine their acceptability. Only then can the FCC proceed to licensing these frequencies by lottery or comparative hearing. And while a lottery procedure has the benefit of speed in processing, a comparative hearing procedure obviously would be far more time-consuming than any other licensing method. The return of these applications and the subsequent auctioning of the frequencies, on the other hand, would require the least processing since only the winning bidders need file a full application. In addition, since processing the pending applications would require the FCC first to resolve the reconsideration petitions and then to solicit and consider the amended pending applications, returning the applications and licensing the frequencies by

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<sup>27</sup> The FCC acknowledged in the Third Notice that the initial basis for the non-commercial set aside was not to "satisfy some perceived demand on the part of the public for such spectrum," but rather to "promote the widest variety of advanced narrowband development." Third Notice at ¶ 34. Now, four-and-one-half years after these applications were filed, the narrowband technology has been employed in the marketplace by SMR Advisory and other industry participants. SMR Advisory agrees with the FCC, therefore, that it is no longer necessary to require a separate non-commercial allocation in the 220 MHz Service; rather, these channels should be available equally to all applicants – both commercial and non-commercial – through a competitive bidding licensing procedure.

auctions (even those held in the third quarter of next year), would likely be the more expeditious and efficient licensing alternative.

As for the third factor, the auctioning of these nationwide frequencies clearly would best ensure that the spectrum is held by the parties to value it the most. This is the very premise underlying the concept of the competitive bidding licensing procedure. Lotteries and comparative hearings turn upon luck and the relative merit of the proposal, respectively; only auctions would award the frequencies to the party willing to pay the most for them. Accordingly, to the extent that Congress and the Commission has determined this factor to be a key consideration in the licensing process – as they clearly have – application of this factor clearly favors the return of the applications and the auctioning of these frequencies.

SMR Advisory is not insensitive to the fact that the 33 non-commercial applicants submitted their applications in good faith and may feel that the FCC is obligated to follow through on the licensing procedure in effect at the time the applications were filed. There is a clear difference, however, between a pending application and a granted license in weighing the entitlement rights of the parties at issue. Moreover, during the four-and-one-half year period since the non-commercial nationwide applications were filed, other parties, such as SMR Advisory, have proceeded to develop the narrowband technology in the marketplace. As a result, the rationale for the initial non-commercial set-aside is less compelling in the current marketplace.

Nor have these applicants yet incurred prohibitive costs with respect to their applications. The FCC properly has proposed to refund all filing fees submitted. And the postponement of the filing of the amendment information, particularly as to financial

requirements, has further minimized the actual out-of-pocket cost to these applicants. On balance, therefore, SMR Advisory believes that the interests of the public generally as evidenced by the three factors discussed above, and the prospective Phase II licensees in particular, outweigh the interests of the non-commercial applicants in this instance.<sup>8/</sup>

## 2. Regional and Economic Areas

The proposal to establish 5 Regional Areas geographically similar to the five regions used by narrowband PCS licensees and 172 Economic Areas (defined by the Bureau of Economic Analysis) are appropriate, the FCC believes, because they are best suited to the characteristics of the 220 MHz Service and will better enable Phase II Licensees to compete with licensees in other services authorized over similarly-sized areas. Third Notice at ¶ 60. SMR Advisory supports the licensing of Phase II Licensing by the specified Regional and Economic Areas.<sup>2/</sup> Based on its experience in the field, these sized areas will permit licensees to make the best use of their licenses.

SMR Advisory has worked to develop a network of licensees over a large geographical area to establish what is effectively a regional system on the West Coast and is currently working on a similar regional network on the East Coast. Based on its experiences with this network, SMR Advisory believes that 220 MHz customers demand (and can

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<sup>8/</sup> The FCC has proposed a ten-year licensing term for nationwide 220 MHz authorizations. Third Notice at ¶ 39. SMR Advisory agrees with the FCC that a term of this length better encourages investment in 220 MHz systems and therefore supports this proposal.

<sup>2/</sup> The FCC also has proposed to maintain the existing Public Safety and EMRS channel allocation. Third Notice at ¶¶ 43-47. SMR Advisory supports this proposal in light of the public interest in better enabling these entities to respond to safety-of-life situations.

receive by virtue of the network approach) extended coverage over a larger geographic area. As a result, a West Coast trunk company dispatcher, for example, can maintain communications with his truck drivers via a single service offering, even when the truck route encompasses several different states. The licensing of 220 MHz frequencies in regional blocks also will alleviate the time-consuming combination of various local licenses currently being undertaken by managers and operators, like SMR Advisory. The ready allocation of frequencies set aside for establishment of a regional system will permit those interested in providing a regional service, such as SMR Advisory, to do so in the most efficient manner.

The Economic Areas also are better suited to the 220 MHz Service than the existing non-nationwide 220 MHz coverage areas. The average size of the Economic Areas (approximately 20,000 square miles) is significantly greater than the average sized coverage area of the current non-nationwide licensee (approximately 2,500 square miles). More importantly, the Economic Areas are a better reflection of the geographic scope of actual business operations. These areas, as defined by the BEA, consist of metropolitan areas that are the centers of economic activity and their economically-related surrounding counties. The non-nationwide coverage areas of Phase I Licensees in the 220 MHz Service, on the other hand (at least as currently defined),<sup>10/</sup> consist of a 38 dBu contour derived from the

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<sup>10/</sup> The "service area" of the Phase I Licensees remains a matter of great concern and interest to existing 220 MHz participants and to AMTA. Although the FCC has proposed that the service area for Phase I Licensees should consist of the area covered by the 38 dBu contour derived from a 220 MHz station operating at certain power and antenna height specifications, this formula may inadequately reflect the Phase I Licensee's actual coverage. This issue also affects the level of protection which should be afforded Phase I Licensees. See note 2 *supra*. As this matter requires substantial technical input and further consultation by and among industry members, SMR Advisory, along with other parties in this proceeding, including AMTA, reserves the right to comment on the appropriate definition of the Phase I and Phase II service areas in the reply round of this proceeding.



originally specified coordinates and power and antenna height characteristics. To the extent that a particular business is interested only in receiving service in its "local" area of business, the breakdown by Economic Area is far more likely to encompass such an area of business operations than the self-defined non-nationwide areas utilized in Phase I. With the extensive movement of most 220 MHz customers, a larger "local" area of operations will better accommodate the extensive movement of the associated mobile units.

Licensing of 220 MHz licenses in both Regional and Economic Areas also will better enable the Phase II Licensees to compete with other services with licensed areas based on similar criteria. To the extent that a competing service is better tailored to actual demands in the marketplace, licensees in the 220 MHz Service will be placed at a competitive disadvantage. The service area parameters obviously constitute an essential component of customer demand; customers want service coverage in the areas where they need it. In sum, therefore, SMR Advisory believes that the FCC's proposal to issue Phase II Licenses for defined Regional Areas and Economic Areas more realistically reflects actual service areas likely to be employed in the 220 MHz Service, and, therefore, should be adopted.<sup>11/</sup>

**B. The Channel Block Size for Regional and Economic Area Licenses Should be Increased.**

The FCC has proposed the following channel allocation for Nationwide, Regional and Economic Area licenses:

- (i) 3 nationwide blocks of 10 channels each;
- (ii) 5 regional blocks of 10, 15, 10, 10 and 20 channels each; and

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<sup>11/</sup> As with the nationwide licenses, the FCC has proposed a ten year license term for the Regional and Economic Area licenses. Third Notice at ¶ 75. SMR Advisory concurs with this proposal for the reasons stated in note 8, supra.

- (iii) 8 Economic Area blocks consisting of 4 blocks of 10 channels each and 4 blocks of 5 channels each.

Third Notice at ¶¶ 37 & 66. In proposing these channel allocations, the FCC appears to acknowledge that most 220 MHz systems generally will require more than 5 channels in order to be economically viable. SMR Advisory believes, however, that the Commission has not gone far enough in allocating a greater number of channels for each block. Based on the field experience already derived by SMR Advisory, as well as its marketing studies and business plans, it seems clear that five-channel blocks are now, and will be, insufficient to meet the needs of most 220 MHz licensees.

In proposing to retain four (4) five-channel blocks for Economic Areas, the Commission notes that Phase II Licensees intending to use their spectrum for internal use in particular, may not need more than five channels. Third Notice at ¶ 63. Elsewhere in the Third Notice, however, the Commission concludes (i) that the vast majority of applicants for 220 MHz spectrum in Phase I proposed to provide service to subscribers on a for-profit basis and (ii) that the principal use of the 220 MHz by Phase II Licensees will likely be to provide for-profit services.<sup>12/</sup> If this is so – and SMR Advisory agrees with the Commission that it likely is true – then the channel allocations should not be made on the basis of the needs of licensees intending to use their spectrum for internal use. The businesses proposing to provide commercial 220 MHz Service (whether they are Phase I

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<sup>12/</sup> See, e.g., Third Notice at ¶ 36 (concluding that the 30 Phase II nationwide channels should be made available to all applicants and not set aside for non-commercial use); Third Notice at ¶ 108 (concluding as part of the justification for selecting a competitive bidding licensing procedure for Phase II Licenses that nationwide, regional and EA 220 MHz spectrum will "principally be used by carriers to provide for-profit services").

Licensees or potential Phase II Licensees) generally believe that 5 channels simply is insufficient to serve the projected customers in their coverage area.

Accordingly, SMR Advisory supports the proposal of AMTA for the following allocation:

- (i) 2 Regional Area blocks of 30 channels each and
- (ii) 3 Economic Area Blocks of 15 channels each and 2 Economic Area Blocks of 10 channels each.<sup>13/</sup>

Allocations of these sizes will permit Phase II Licensees to more fully serve the needs of the public in the licensed areas without resort to time-consuming and cumbersome requests and procedures for channel aggregation.<sup>14/</sup> SMR Advisory further agrees with AMTA, moreover, that Phase II Licensees should not be precluded from aggregating channels

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<sup>13/</sup> Indeed, to the extent the Commission would consider channel allocations of even larger sizes, SMR Advisory also would support an allocation of 3 Economic Area blocks of 20 blocks each. In addition, SMR Advisory supports the FCC's proposal to allocate 3 nationwide blocks of 10 channels each, although a nationwide allocation of 2 channel blocks consisting of 15 channels each also would be acceptable. See Third Notice at ¶ 37.

<sup>14/</sup> At least two 220 MHz manager/operators have urged the Commission to remove the restriction on aggregating channels in a single service area under Section 90.739 of the Commission's Rules. Third Notice at ¶¶ 184 & 187. These entities have indicated that 5 channels are insufficient to provide adequate service in certain local areas, and requested the ability to aggregate those channels. The Commission has rejected these requests on the grounds that the operators/managers had not submitted "outstanding requests" for communications service. In light of the Commission's general acknowledgement that 5 channels may be insufficient to serve the needs of Phase II Licensees, SMR Advisory urges a more flexible approach to requests for waiver of Section 90.739. The manager/operator should be permitted, for example, to justify additional channels by adequately supported engineering and marketing projections, and not just by the submission of outstanding requests for service. Once such requests are made (and outstanding for any period of time), the effect on the 220 MHz business can be devastating if relief is not promptly provided.

acquired in the Phase II licensing, and indeed, should not be restricted in any way from aggregating channels.<sup>15/</sup>

C. **SMR Advisory Supports the Elimination of  
Use Restrictions in the 220 MHz Service.**

The FCC proposed several changes to the technical and operational rules governing the 220 MHz Service, many of which were designed to remove use restrictions currently in place. In particular, the FCC requested comment on the following:

- (i) Whether it should modify its current rule allowing fixed operations only on an ancillary basis to primary mobile communications and permit such operations on a primary basis in the 220 MHz band;
- (ii) Whether Phase I and Phase II Licensees should be permitted to aggregate their contiguous five KHz channels to create wider bandwidth channels; and
- (iii) Whether Phase I and Phase II Licensees should be permitted to perform paging operations on a primary basis?

Third Notice at ¶¶ 76 - 87.

SMR Advisory generally supports each of these proposals in that they will better enable 220 MHz licensees – granted under both Phase I and Phase II licensing procedures – to maximize the use of their licenses and to compete more effectively in the marketplace. The regulatory trend for all wireless services competing in the marketplace clearly has been toward expansion of permitted uses for specified frequencies. The provision of auxiliary services by cellular service operators, for example, has expanded greatly since the initial

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<sup>15/</sup> The FCC also requested comment on whether the channels allocated to the various blocks should be contiguous or not. Third Notice at ¶64. SMR Advisory supports AMTA's comments on this issue. The FCC should retain the current channel spacing on the existing "local" channels, and assign contiguous frequencies only on spectrum already assigned that way (e.g., data and conventional frequencies).

allocation of that service.<sup>16/</sup> And the rules governing narrowband and broadband personal communications services (PCS) are intentionally broad with respect to permissive uses in order to provide maximum flexibility to the licensees employing those frequencies.<sup>17/</sup>

This is not to say that licenses in the 220 MHz Service will abandon the narrow-band technology originally contemplated for this frequency band. To the contrary, SMR Advisory expects that the highly efficient 5 KHz technology will continue to play a key role in the provision of service in the 220-222 MHz band, and indeed has invested considerable time, effort and funds to that end. The expansion of permissive uses for these frequencies, however, will broaden the choices available to Phase I and Phase II Licensees so as to better enable them to tailor their services to the needs of the public. Licensees in rural areas, for example, may find a demand for fixed service which would not exist in more congested urban areas. Other licensees may find that a paging offering is necessary to compete with PCS operators in more urban locations. Whatever the situation, SMR Advisory believes that the increased flexibility afforded the 220 MHz licensees will further the public interest by enabling licensees to be more responsive to the needs of the marketplace.

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<sup>16/</sup> See, e.g., 47 C.F.R. § 22.901(d) (cellular licensees may provide a broad array of auxiliary common carrier services, including personal communications services).

<sup>17/</sup> See 47 C.F.R. § 20.3 (narrowband and broadband PCS licensees may provide any mobile communications on their assigned frequencies).

**D. The Commission Should Deem All Phase I Licensees To Have Met The Criteria For Special Temporary Authority Pending Grants of Modification Applications.**

The FCC also proposed a number of rules relating to application procedures in the 220 MHz service, most of which are appropriate and acceptable. Third Notice at ¶¶ 100-107. The provision of a renewal expectancy for all Phase I and Phase II Licensees, for example, is consistent with similar expectancies in other services, and warrants application of a similar rule here.<sup>18/</sup> The FCC's proposed rules for application amendments and license modifications also are consistent with the rules governing other reclassified Part 90 services, and therefore, should be adopted.

The FCC's proposal to apply the more stringent Part 22 rules to requests for Special Temporary Authority (STA) by nongrandfathered 220 MHz CMRS licensees, on its face, appears reasonable. It is essential, however, that the proposed rules governing STAs for 220 MHz licensees be clarified in one critical respect. To the extent that a Phase I Licensee requests either an initial STA or an extension of an existing STA, the FCC should deem such request to have met the pertinent criteria for STAs until such time as the modifications permitted under the Fourth Notice in this proceeding have been granted. This should be the case regardless of the Phase I Licensee's grandfathered status or its classification as a private or a commercial mobile radio service provider.

The freeze which has been in effect for all modifications in the 220 MHz Service since 1991 has created a situation where licensees whose original sites were no longer available were able to construct at alternative sites only pursuant to STAs. Upon the

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<sup>18/</sup> See, e.g., 47 C.F.R. § 22.941 (cellular renewal expectancy).

conclusion of the Fourth Notice in this proceeding, SMR Advisory hopes that most Phase I Licensees will be able to obtain permanent authority at the sites currently constructed pursuant to STAs. To the extent that an STA currently in effect expires, however, and the Phase I Licensee requests an extension (or if the Phase I Licensee is attempting to obtain an initial STA for that matter), the FCC should not impose the more stringent standards to such STAs until the Phase I Licensee has had the opportunity to file and receive a grant of a modification to its initial license. To find otherwise could strand the Phase I Licensee at an unauthorized site pending the filing and grant of its modification application.

Accordingly, the FCC should deem that the modification freeze currently existing, by definition, constitutes the "extraordinary" circumstances necessary to support continued special temporary authority. Of course, this concern applies only until the FCC has adopted and implemented rules to permit the filing of modifications by Phase I Licensees, and those permitted modifications have been granted.

**E. SMR Advisory Supports the FCC's Proposed  
Auction Rules for the 220 MHz Service.**

In considering the appropriate licensing method for Phase II Licenses, the FCC tentatively concluded that the 220 MHz Service as a class satisfies the Section 309(j) criteria for auctionability. Third Notice at ¶ 108.<sup>19/</sup> SMR Advisory agrees with the FCC's conclusions in this regard. 220 MHz spectrum – whether licensed on a nationwide, Regional or Economic Area basis – will likely be principally used by carriers to provide for-profit

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<sup>19/</sup> These criteria include: (i) the filing of mutually exclusive applications; (ii) for spectrum, the principal use of which will involve, or is reasonably expected to involve the provision of for-profit services; (iii) the auctioning of which will speed the development and deployment of new services to the public with minimal administrative or judicial delays, and encourage efficient use of the spectrum. See 47 U.S.A. § 309(j)(3)(B).

services. Certainly all of the systems managed by SMR Advisory either currently provide, or in the near future will provide, commercial services. In addition, based on consultations with other industry participants, it seems clear that the vast majority of other 220 MHz systems constructed to date also either now offer, or in the near future will offer, service on a for-profit basis.

Moreover, the auctioning of 220 MHz spectrum constitutes an efficient and expeditious licensing procedure. Only the winning applicant need submit a long-form application for consideration by the Commission, reducing the processing time associated with application review. The auction procedure encompasses all of the service areas over a specified period of time, after which all of the service areas are licensed to the winning bidders. Because these bidders paid full value for their licenses, they are far less likely to make inefficient use of the spectrum associated with the licenses, than if they had acquired the licenses in a lottery procedure with a nominal capital investment.

The FCC's selection of simultaneous multiple round auctions as the method of choice also seems appropriate for the 220 MHz Service. It is SMR Advisory's belief that these licenses will be highly interdependent; potential bidders will require information on all such interdependent licenses during the auction procedure in order to make informed judgements on bidding strategies. In addition, certain existing operators, such as SMR Advisory, will be looking to aggregate and substitute frequencies in order to enlarge or complement existing Phase I 220 MHz systems.<sup>20/</sup> These conditions clearly support the use

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<sup>20/</sup> SMR Advisory also agrees with the FCC's proposal to auction the nationwide and regional licenses together in simultaneous multiple rounds, to be followed by simultaneous multiple round auctions for all Economic Areas. Third Notice at ¶ 116. This grouping  
(continued...)



of simultaneous multiple round auctions over the other auction methods available to the Commission.<sup>21/</sup>

SMR Advisory also enthusiastically supports the FCC's proposal to establish certain bidding preferences for small businesses in the 220 MHz Service. Specifically, the FCC has proposed certain bidding credits, reduced down payments and installment payments for small businesses on all 220 MHz channel blocks in the Nationwide, Regional and Economic Area channel groups. The small business threshold will vary depending upon the area subject to bidding as follows:

- Entities bidding on Economic Areas will be deemed small businesses if they have had less than \$6 million in average annual gross revenues for the preceding three years; and
- Entities bidding on Regional and Nationwide Areas will be deemed small businesses if they have had less than \$15 million in average annual gross revenues for the preceding three years.

Third Notice at ¶ 170. Those entities qualifying as a small businesses for the Economic Areas will receive a Ten Percent (10%) bidding credit in the auction. Those entities qualifying as small businesses for the Regional and Nationwide Areas will receive a Forty Percent (40%) bidding preference in the auction. Third Notice at ¶¶162-163. The FCC

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<sup>20/</sup>(...continued)

combines those licenses most likely to be interdependent and best enables prospective bidders to pursue aggregate bidding strategies.

<sup>21/</sup> The FCC's proposed rules with respect to bid increments, stopping rules and activity rules follow the basic framework already established in auctions for other services, and seem appropriate for the 220 MHz Service as well. See Third Notice at ¶ 117-129. Similarly, SMR Advisory supports the FCC's proposed rules with respect to pre-auction application procedures, up-front payments, down payments and full payments, bid withdrawal procedures, transfer disclosure and anti-trafficking provisions, performance requirements and rules prohibiting collusion. See Third Notice at ¶¶ 130-149.